IRIS CHONG & CO v. YI-LI AUTO ENTERPRISE SDN BHD

HIGH COURT MALAYA, SHAH ALAM
MUNIANDY KANNYAPPAN J
[CIVIL APPEAL NO: BA-12B-121-12-2020]
8 MARCH 2023

Abstract – *A solicitor, in confirming payment of monies to a non-client third party, upon the instruction of his client, cannot be guilty of the tort of 'assumption of responsibility' or of breach of duty of care if the monies were not so paid as a result of the retraction of the instruction by the client. What more if the client, having retracted the instruction, had also issued an indemnity to protect the solicitor from liability. In any case, a solicitor, as a matter of general law for cases of pure economic loss, owes a duty of care only to his client, and not to such a third party.*

TORT: *Negligence – Assumption of responsibility – Principles and scope – Advocate and solicitor – Sale and purchase of property – Vendor borrowed monies from plaintiff – Solicitor as stakeholder relayed to plaintiff vendor's instruction to repay loan from purchase price – Instruction retracted by vendor and no repayment made to plaintiff – Whether solicitor negligent – Whether liable in damages to plaintiff*

The first defendant ('D1') and his wife were vendors in a sale and purchase agreement of a property ('SPA') which they executed with a purchaser. It was undisputed that whilst the purchaser was represented by the second defendant legal firm ('Iris Chong & Co, otherwise D2'), D1 and his wife were not so represented. D1 had, prior to the execution of the SPA, borrowed RM100,000 from Yi-Li Auto Enterprise Sdn Bhd, the plaintiff respondent herein, and, to repay the loan, had formally instructed D2 to offset that amount from the purchase price and remit same to the plaintiff. D2, then, by letter dated 17 February 2012, confirmed with the plaintiff about the repayment arrangement ('confirmation letter'). Subsequently, however, D1 retracted his instruction to D2, and thereafter issued an indemnity letter to cover D2 from liability. And so it was that D2, upon receiving the purchase price, released all the monies to D1 and his wife.

Aggrieved, the plaintiff sued both D1 and D2 and obtained a judgment against D1 for RM100,000. As for D2, it was the plaintiff's allegations that the legal firm was guilty of the tort of 'assumption of responsibility' and had breached its duty of care to the plaintiff and was therefore liable in damages. D2 retorted that it could not be liable as the plaintiff was not its client and because no duty of care could have arisen from the confirmation letter since the same had been retracted by D1. The Sessions Court Judge ruled in favour of the plaintiff and D2, hence, appealed.

Held (allowing appeal and holding D2 not liable in damages):

(1) The confirmation letter issued by D2 to the plaintiff was only a communication of information to the plaintiff as to the manner of repayment of the loan taken by D1. To attribute liability or duty of care on that basis was misplaced, as the plaintiff was not D2's client, was not privy to the loan transaction and was only a stakeholder acting on the instruction of D1 who had legal right to the monies. (paras 11 & 13)

(2) As a matter of general law, a solicitor in cases of pure economic loss owed a duty of care only to his client and not to the opposite party. This aside, on the facts of the present case, D2's interest against any claim or liability would be protected and safeguarded by the indemnity letter thus issued by D1 for its benefit. (para 13)

(3) The law on 'assumption of responsibility' could not be stretched so far as to include the instances in the present case. This was a tripartite transaction whereby D2's relationship with the plaintiff only came about on account of D1's instruction, and not because of any independent or direct relationship with the plaintiff. The two parties were not at all in proximity, and it would be unjust and reasonable to hold D2 as owing a duty of care to the plaintiff. (para 15)

(4) The advancement of the loan and its repayment must have been negotiated and agreed upon by the plaintiff and D1 before the instruction letter or the confirmation letter were issued by D2 to the plaintiff. D2, therefore, could not assume responsibility toward the repayment. The confirmation letter did not say that D1 would assume responsibility on the loan repayment, and in any case came with a qualification that it was issued pursuant to D1's instruction. (para 16)

(5) D2 could only be liable to the plaintiff if it had accepted direct responsibility toward the plaintiff which in the present it had not. Only in such circumstance that an independent duty of care would have arisen as would make D2 liable for its breach. There was no such voluntary assumption of responsibility by D2 here. There was further no confidential or fiduciary or special relationship between D2 and the plaintiff as would enable the plaintiff to invoke the alleged tort against D2. (paras 18 & 19)

Case(s) referred to:

Al-Kandari v. JR Brown & Co (1988) QB 665 ***(refd)***
Caparo Industries Plc v. Dickman (1990) 2 AC 605 ***(refd)***
Customs and Excise Commissioners v. Barclays Bank Plc (2006) UKHL 28 ***(refd)***
Hedley Byrne & Co Ltd v. Heller & Partners Ltd (1964) AC 465 ***(refd)***
Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(refd)***
Kepong Prospecting Ltd & Ors v. Schmidt [1967] 1 LNS 67 PC ***(refd)***
Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estate Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

NRAM Ltd (formerly NRAM plc) v. Steel And Another (Scotland) (2018) 3 All ER 81 ***(refd)***
Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals [2019] 3 CLJ 441 FC ***(refd)***
Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal [2018] 2 CLJ 641 FC ***(refd)***
Toh Fong Cheng & Ors v. Pang Choon Kiat & Ors & Another Appeal [2020] 1 LNS 2123 CA ***(refd)***
White & Another v. Jones And Others (1995) 2 AC 207 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 2(d)
Courts of Judicature Act 1964, s. 29
Rules of Court 2012, O. 42 r. 7(1), O. 45 r. 1

For the appellant/D2 - CK Yeoh & Amber Kiew; M/s Ranjit Singh & Yeoh
For the plaintiff/respondent - Nashvinder Singh Gill; M/s Sharif & Khoo

Reported by Wan Sharif Ahmad

JUDGMENT

Muniandy Kannyappan J:

[1] This appeal is by way of rehearing pursuant to s. 29 of the Courts of Judicature Act 1964 (Act 91). Hence, the record of proceeding at the Sessions Court, including grounds of judgment by the Sessions Court Judge (SCJ) comes into curial scrutiny by this court. On scrutinising it, the following are this court's observation and findings. Parties are referred to as plaintiff and defendant as originally cited during trial of the action at the Sessions Court.

Subject Matter

[2] Subject matter of dispute between the plaintiff, first defendant (D1) and second defendant (D2) is a loan amount of RM100,000 arising from a sale and purchase of property (SPA).

[3] In the sale and purchase transaction, D1 and his wife were vendors. They had no legal representation, whilst purchaser of the property was represented by the firm of solicitors, D2. Plaintiff is not a party to the SPA but had advanced loan of RM100,000 to D1, which has to be repaid. Allegedly, the mode of repayment was agreed upon by plaintiff *via* an instruction from D1, contained in a letter to plaintiff, dated 17 February 2012, sent *via* D2. In the said letter of instruction, D1 had instructed and authorised D2 to release the sum of RM100,000 from the balance purchase price (which would be received from the purchaser pursuant to the SPA) to the plaintiff. Content of the instruction from D1 reads:

> Vendor letter of instruction and Indemnity
>
> We hereby irrevocably instruct and authorise you to release the sum of RM100,000 from the balance purchase price or any part(s) thereof due in respect of the above property to Yi Li Auto Enterprise Sdn Bhd.

[4] *Vide* another letter dated 21 February 2012 to plaintiff, D2 had confirmed the instruction from D1 to release a sum of RM100,000 to the plaintiff on receipt of the balance purchase price from the sale and purchase of property involving D1 as vendor. For all intents and purposes, the instruction is from D1 to the plaintiff and D2 is merely an intermediary *cum* conduit to the said instruction to plaintiff. It is iterated, D1 was not represented by D2 in the sale and purchase transaction, but it had merely acted as stakeholder for the balance of purchase price received from the purchaser, whom they were representing. As stakeholder, D2 at all material times acted on the instruction of D1; loosely 'client' in that sense, on the manner of dealing with the balance purchase price, which was received in his favour from the purchaser. Regardless of the letter of instruction by D1, D2 had released the sum of RM100,000 to D1 instead of the plaintiff. That became the bane in the dealing between plaintiff and D1. Plaintiff is disgruntled, as it did not receive repayment of the loan, as promised by D1.

[5] It is apparent the loan transaction is between plaintiff and D1, and D2 is not privy to it. D2's role unearthed, when it had acted for the purchaser for a sale and purchase transaction involving D1 as the vendor. As it had acted for the purchaser in the said transaction, it had also received instruction from D1 on the mode of settlement of the loan he has taken from the plaintiff, and nothing more. The plaintiff and D1 must have been in goodwill, as the loan repayment was agreed upon, with the instruction from D1. It could be inferred the agreement came about after negotiation between both of them. Therefore D2's role is clear, it was merely acting on the instruction of D1, to communicate his instruction to the plaintiff, *vis* the loan transaction between them. In that respect, D2 was not in a direct and privileged relationship with the plaintiff to render legal advice on the said loan transaction. It was also not involved in offering any legal advice to the plaintiff on the sale and purchase of property, involving D1. D2 was only made aware of the loan transaction, by virtue of the instruction from D1 to it, which was communicated to the plaintiff, pursuant to D2's relationship with D1 as stakeholder.

The Claim

[6] The plaintiff had obtained judgment in default (JID) against D1 for not repaying the loan advanced. So, the issue of liability between plaintiff and D1 is resolved, and there had been no attempt by D1 to set aside the said JID. In that respect, it is an unequivocal admission by D1 that he owed plaintiff an amount of RM100,000. Lengthy submission was made by counsel for D2 on the veracity of the loan by plaintiff, *inter alia*, if it was in fact advanced to D1 by the plaintiff and not by its managing director and his wife, as the funds was wired from their bank account. The answer to this is pure and simple; with the enforceable JID, it is irrefutable proof that the loan was owed by D1 to the plaintiff, and not anyone else. (See *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014]

2 MLJ 768). Furthermore, D1 at all material times did not dispute the debt owed to the plaintiff, as it is stated affirmatively in his letter of instruction dated 17 February 2012, referred to above, in which he had instructed D2 to release RM100,000 from the balance purchase price to the plaintiff, Yi Li Auto Enterprise Sdn Bhd. Consideration for the loan by plaintiff, as submitted by counsel for plaintiff, may move lawfully from the managing director of the plaintiff and his wife, *albeit* being third parties, pursuant to s. 2(d) of the Contracts Act 1950 (Act 136), also fortified by the binding decision of the Privy Council in the case of *Kepong Prospecting Ltd & Ors v. Schmidt* [1967] 1 LNS 67. Although such, it has no effect whatsoever on the nature and character of the loan transaction between plaintiff and D1. Additionally, since the JID obtained by plaintiff against D1 is not set aside, it remains as a regularly obtained judgment, and it takes effect from the day of its date pursuant to O. 42 r. 7(1) of the Rules of Court 2012 (ROC); so D1 is without an alternative but to abide by it. The plaintiff on the other hand, could enforce the said judgment against D1 pursuant to O. 45 r. 1 of the ROC.

[7] As against D2, claim by plaintiff is, as it had issued the confirmation letter dated 21 February 2012, D2 had assumed responsibility and thereby owed a duty of care to the plaintiff to ensure the amount of RM100,000 was duly paid to the plaintiff on receipt of the balance purchase price for the sale and purchase of property, where D1 was the vendor. As the said amount was not remitted to the plaintiff but instead to D1, D2 is alleged to have breached its duty of care to the plaintiff, thus, causing loss and damage, leaving the loan amount due from D1 unpaid. But of course, D2 contends otherwise, that it owed no duty of care to the plaintiff and it did not cause any loss and/or damage, allegedly suffered by the plaintiff. The stark fact is, the plaintiff is not without a recourse, since it could enforce the JID obtained against D1.

Issue

[8] The pivotal issue in this case is, did D2 assume responsibility on the repayment of loan of RM100,000 advanced by plaintiff to D1, pursuant to the letter of confirmation dated 21 February 2012 sent by D2 to the plaintiff. If the answer is yes, there would have been a breach of duty of care to the plaintiff, who is not a client of D2, but has suffered damage, as the loan amount of RM100,000 due from D1 remained unpaid. In short, could D2 be held responsible to the plaintiff for non-payment of the said loan by D1?

Explanation By D2

[9] D2, as a firm of solicitors has offered an explanation as to why the earlier instruction by D1 to pay plaintiff the amount of RM100,000 was not adhered to. Reason being, D1 had subsequently instructed D2 not to do so. On or about 9 April 2012, D1 and his wife had instead instructed D2 to release the said sum to D1 as one of the vendors to the SPA. It was pursuant to that instruction, D2 had released the sum to D1 *vide* letter dated 16 April 2012. So, the release of monies did not take place willy-nilly, but only after

D1 had advised D2 to do so. It was also represented by D1 to D2 that he had settled the repayment of loan to plaintiff. Together with the letter of release, from D2 to D1, there was also an indemnity provided by D1 that he would take responsibility in case of any claim by plaintiff against D2 on repayment of the said loan. Therefore, there had been a countervailing instruction by D1 on 16 April 2012 against his first instruction on 17 February 2012. Thus, on 10 September 2012, D2 informed the former solicitors of the plaintiff, that D1 being the vendor to a sale and purchase transaction had instructed it to comply strictly with the SPA, and no monies were to be released to the plaintiff or any third party. So, could D2 do anything else due to the change of instruction by D1?

In Sum Total

[10] For all intents and purposes, the confirmation letter issued by D2 to the plaintiff, subsequent to the letter of instruction from D1, is purely communication of information to the plaintiff on the manner of repayment of the loan of RM100,000 taken by D1. The communication came about, as D1 had instructed D2 to do so. To attribute liability to D2 on the basis of issuance of the said confirmation letter is misplaced, because D2 as stakeholder, was merely acting on the instruction of D1. Furthermore, D2 is not privy to the loan transaction negotiated and agreed upon, including the mode of repayment between D1 and the plaintiff. Thus, claiming D2 had assumed responsibility for repayment of the loan by D1 to plaintiff, is also without basis. Since D2 was stakeholder for the balance purchase price received from the purchaser to the sale and purchase transaction, he is without a choice, but to act on the instruction of D1 who was the vendor to the said transaction. Thus, upon receipt of the balance purchase price and how it ought to be distributed, is entirely at the discretion of D1, who has a legal right to the said monies. D2 at all material times shall only act on the instruction of D1 and not anyone else, including the plaintiff. By acting under the instruction of D1, D2 has not committed any breach and from inception, D2 does not owe a duty of care to the plaintiff. Further, it had not assumed responsibility for repayment of the loan by D1, as the said loan was negotiated and agreed upon by both plaintiff and D1, including the mode of repayment and D2 is not privy to it. Therefore, in effect D2 acts on the instruction of D1 at all material times; the indemnity letter issued by D1 to D2 after instructing D2 to pay him instead, was also to safeguard the interest of D2 from any claim against it.

[11] Essentially, D2 has not shirked its responsibility, but had acted on the instruction of D1 for the monies belonging to him to be paid to him instead. The subsequent instruction was followed by D2, only when it had obtained confirmation from D1, that the loan by D1 to plaintiff had been settled. The sale and purchase transaction involving D1 is for all intents and purposes, separate and distinct from the loan agreement between plaintiff and D1. To reiterate, D2 was only acting on the instruction of D1 in respect of the release

of RM100,000 to the plaintiff *vis* its position as stakeholder. An assumption of responsibility will only come about if there is cogent proof and substantiated evidence from the plaintiff, that it had a role in the loan transaction between plaintiff and D1. The confirmation letter issued by D2 does not tantamount to assumption of responsibility on its part for repayment of the loan, but merely confirming its duty as stakeholder. D1 is solely responsible to repay the loan taken from plaintiff and it is for the plaintiff to pursue with D1 and not to seek repayment from D2, a total stranger to the loan transaction. The plaintiff could have even taken steps under the law to garnish the proceeds from the balance purchase price to be received by D1 from D2, as it had full knowledge that it was due to D1 from D2. Evidently, all these salient issues were not considered by the SCJ, adjudicating the case, but has merely adopted a strait-jacket approach to attribute liability on D2. She has failed to consider, firstly that D2 was only in communication with the plaintiff, by conveying the instruction from D1 and nothing more, thus, to protect itself from further liability as stakeholder, it had issued a confirmation letter to the plaintiff. As a shield from any claim by plaintiff, it had procured a letter of indemnity from D1; and secondly it is only apparent that D2 is not privy to the loan transaction between D1 and the plaintiff. It seems the SCJ was swayed by submission of counsel for plaintiff, a misconception under the law. Why misconceived?

Pleaded Cause Of Action And Law Applicable

[12] Plaintiff has pursued a case against D2 premised on a cause of action in negligence *vis* tort of assumption of responsibility. In order to succeed, it has to satisfy with admissible proof that D2 owed the plaintiff a duty of care; in turn D2 has breached the said duty; resulting in loss and damage to the plaintiff. To determine if there is a duty of care, the three-fold test, as propounded by our apex court in the case of *Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals* [2019] 3 CLJ 441; [2019] 2 MLJ 553 applies, which are if the damage suffered by the plaintiff was reasonably foreseeable; if there was a relationship of proximity between the plaintiff and D2 and if it is fair, just and reasonable for D2 to owe a duty of care to the plaintiff.

[13] Ensuing from that, since the plaintiff is not a client of D2, it does not owe the plaintiff, a non-client, duty of care. In cases involving pure economic loss, the law is, a solicitor owes a duty only to his client but not the opposite party. But there are exceptions. A duty of care is owed to the non-client if the solicitor has assumed responsibility towards the opposite party. It was so decided in *Pushpaleela*, following the English Supreme Court decision in the case of *NRAM Ltd (formerly NRAM plc) v. Steel And Another (Scotland)* (2018) 3 All ER 81 (*NRAM*). That case dealt with the issue on duty of care and assumption of responsibility by a solicitor towards the opposite party. The Supreme Court went through six leading cases and held:

> Perhaps it helps only slightly for us to have been reminded in the authorities cited above that Ms Steel and the firm are liable to Northern Rock only if it was a special case. *Probably of greater assistance is the analysis in the Al-Kandari case that the solicitors owed a duty of care to the opposite party because they had stepped outside their normal role.* But the six authorities cited above demonstrate in particular that *the solicitor will not assume responsibility towards the opposite party unless it was reasonable for the latter to have relied on what the solicitor said and unless the solicitor should reasonably have foreseen that he would do so*. These are, as I have shown, two ingredients of the general liability in tort for negligent misrepresentation; but they are particularly relevant to a claim against a solicitor by the opposite party because the latter's reliance in that situation is presumptively inappropriate. Thus the reasonableness of the *claimant's reliance* and of the *defendant's foreseeability* of it comprised the special feature which gave rise to the liability in the *Allied Finance* case and in the Dean case and to the arguable liability in the Connell case; and, although the claim in the *Midland Bank* case failed for other reasons, the fourth of the requirements valuably identified in Lord Jauncey's judgment was that *the solicitor should have been aware that the pursuer was likely to rely on what he had said.* (emphasis added)

The Supreme Court also held:

> Overarchingly, however, neither the general jurisprudence relating to liability in negligence for a misrepresentation leading to economic loss nor the focused jurisprudence relating to a solicitor's liability to the opposite party in that regard supports a conclusion that it is not always necessary for the representee to establish that it was reasonable for him to have relied on the representation. On the contrary, the **reasonableness of his reliance on it is, as I have explained, central to the concept of an assumption of responsibility.** (emphasis added)

[14] Therefore, principles that could be distilled from *NRAM* are:

(i) it must be a special case in that the solicitor has stepped outside their normal role;

(ii) it was reasonable for the opposite party to rely on what the solicitor said;

(iii) the solicitor has reasonably foreseen that the opposite party would rely on his or her representation; and

(iv) it was not necessary for the other party to establish that it was reasonable for him to have relied on the representation.

Reliance On The Confirmation Letter By D2

[15] Counsel for the plaintiff/respondent submitted at length on how the plaintiff had relied on the confirmation letter sent by D2 dated 21 February 2012, that D1 would repay the loan borrowed from plaintiff as soon as the balance purchase price is paid to him. But the material facts below, demonstrates such reliance is unreasonable:

(i) in view of the instruction letter dated 17 February 2012, it was D1 who had instructed and authorised D2 to release the RM100,000 to the plaintiff.

(ii) pursuant to the instruction letter, a confirmation letter was issued by D2 to the plaintiff.

(iii) it only means, at that point of time, the advancement of the loan and its repayment by D1 had already been negotiated and agreed between the plaintiff and D1.

(iv) thus, it would be unreasonable for the plaintiff to have relied on the confirmation letter dated 21 February 2012 from D2. Pursuant to an earlier agreement with D1, it is only reasonable for the plaintiff to rely on the instruction letter dated 17 February 2012 from D1 on repayment of the loan.

(v) therefore, reliance has to be on D1's representation to the plaintiff which was made *via* D2.

(vi) in the circumstance, D2 has no direct dealing with the plaintiff but merely undertaking its role as stakeholder to communicate D1's instruction to the plaintiff. Hence, D2 did not step outside its normal role, but to act on behalf of D1.

(vii) when D2 issued the confirmation letter, plaintiff already had full knowledge of the instruction given by D1 on repayment of the loan, so it is only likely and foreseeable for the plaintiff to have relied on the instruction cum representation made by D1, independent of D2.

(viii) to reiterate, it is unreasonable for the plaintiff to have relied on D2's confirmation letter which is only confirmation of D1's instruction in his letter dated 17 February 2012.

(ix) there is also no relationship of proximity between D2 and the plaintiff, since communication with the plaintiff emerged because of D1's instruction.

(x) the law on assumption of responsibility cannot be stretched thus far to include the instance in the present case, as the transaction in question is tripartite in nature, amongst D1, D2 and the plaintiff. D2's relationship with plaintiff came about because of D1's instruction and not because of an independent or direct relationship with the plaintiff. (See *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* (1964) AC 465; *White & Another v. Jones And Others* (1995) 2 AC 207; *Customs and Excise Commissioners v. Barclays Bank Plc* (2006) UKHL 28).

(xi) applying the *Caparo* test as propounded in the case of *Caparo Industries Plc v. Dickman* (1990) 2 AC 605), in the circumstances, the parties were not in a relationship of proximity and it would not be fair, just and reasonable to hold D2 owed a duty of care to the plaintiff. (See also *Customs and Excise Commissioners v. Barclays Bank Plc* (2006) UKHL 28).

(xii) D2 was not in control of the circumstances, as emphasised, it was only acting under the instruction of D1, thus it is D1 who shall take responsibility for the situation and act accordingly and not to omit his duty to repay the loan taken from the plaintiff.

Findings

[16] Thus, ensuing from the above, it is demonstrated, D2 did not assume responsibility towards the plaintiff on the loan repayment and it would have been unreasonable for the plaintiff to have relied on the confirmation letter given by D2. Moreover, D2 could not have reasonably foreseen that plaintiff would have relied on said confirmation letter, since the instruction to repay the loan came from D1. As alluded to above, advancement of the loan and its repayment must have been negotiated and agreed upon by plaintiff and D1 before the instruction letter and confirmation letter were issued to the plaintiff. Additionally, in the confirmation letter issued by D2 to the plaintiff, it is not stated affirmatively that it would assume responsibility on the loan repayment by D1. The confirmation is with a qualification, that it is pursuant to instruction from D1. It reads as:

> We hereby confirm that the Vendors have instructed and authorised us to release the sum of RM100,000.00 from the balance purchase price or any part(s) thereof due in respect of the above Property to your good selves upon us in receipt of the balance purchase price from the Purchaser's financier upon completion of the Sale and Purchase Agreement dated 13th May 2011.

[17] At this juncture, it would be prudent to refer to the case of *White And Another v. Jones And Others* (1995) 2 AC 207, which is a case where a solicitor was found liable to the intended beneficiaries of his client, the testator, who died before the solicitor came round to drawing up a will under instructions to confer a benefit on them. The House of Lords (Lord Keith and Lord Mustill, dissenting) held that where a solicitor accepted instructions to draw up a will and as a result of his negligence an intended beneficiary under the will was deprived of a legacy, the solicitor was liable for the loss of the legacy. Lord Goff and Lord Nolan based their decision on extending the assumption of responsibility by the solicitor towards his client in law to an intended beneficiary. But they made it clear that this assumption of responsibility existed only if the loss of the beneficiary was foreseeable to the solicitor, and if the circumstances of the situation were that there was no confidential or fiduciary relationship between the parties, and neither the testator nor his estate had a remedy against the solicitor. Tort liability was appropriate in such circumstances only because otherwise an injustice would occur, as a result of a *lacuna* in the law and there would be no remedy for the loss caused by the solicitor's negligence to the beneficiary. Lord Browne-Wilkinson and Lord Nolan held that the principle of assumption of responsibility should be extended to a solicitor who accepted instructions to draw up a will, holding him to be in a special relationship with those

intended to benefit under it. Further in the case of *Customs and Excise Commissioners v. Barclays Bank Plc* (2006) UKHL 28, the House of Lords also pointed out that the parties have to be about as far from being in a relationship "equivalent to contract" as they could be, and has to be in a relationship of proximity, if otherwise, it would not be fair, just and reasonable for a duty of care to be owed. In the case of *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* (1964) AC 465 at p. 520, it was decided by Lord Devlin – a promise given without consideration to perform a service cannot be enforced as a contract by the promise; but if the service, is in fact performed and done negligently, a recovery action is available in tort. This led him to limit assumption of responsibility to relationships which are "equivalent to contract", where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract.

[18] Surveying the case authorities, D2 is only liable to the plaintiff, a non-client, if it accepts direct responsibility towards the plaintiff. In the present case, D2 did not, as the funds do not belong to D2, but D1 who had agreed to repay the plaintiff from the balance purchase price received. Only if D2 accepts direct responsibility towards the plaintiff, it would have created an independent duty of care to the plaintiff and shall be personally liable to it when it breached such duty of care. (See *Al-Kandari v. JR Brown & Co* (1988) QB 665). Further, D2 may only be found to have owed a duty of care to the plaintiff, who is not its client when there had been a "voluntary assumption of responsibility on its part" (See *Toh Fong Cheng & Ors v. Pang Choon Kiat & Ors And Another Appeal* [2020] 1 LNS 2123; [2020] MLJU 1476). In the present case, there is no voluntary assumption of responsibility by D2 as the confirmation letter came about as a result of D1 agreeing to release the funds to plaintiff on receipt of balance purchase price by D2 as stakeholder for the sale and purchase transaction involving D1 as a vendor. The alleged loss and damage suffered by the plaintiff because of non-payment of the loan amount due from D1 was not foreseeable by D2, as it was informed by D1 he had settled the loan amount when he finally instructed to remit the RM100,000 from the balance purchase price to himself. There was also no confidential or fiduciary or special relationship between D2 and the plaintiff, as it was merely acting on the instruction of D1 who was the vendor to the conveyancing transaction with the client of D2 who was the purchaser. Moreover, if not for D1's instruction to D2, it would not have issued the letter of instruction and confirmation to the plaintiff and the issuance of those letters does not render the relationship of D2 with the plaintiff, as one of proximity. Thus, it is unfair, unjust and unreasonable for a duty of care to be owed by D2 to the plaintiff. Ensuing from that, the remedy available for the plaintiff is only against D1 and not D2.

[19] Thus, in a nutshell, D2 did not assume responsibility to the plaintiff to ensure repayment of the loan of RM100,000 borrowed by D1 from the plaintiff, for the following reasons:

(i) the funds do not belong to D2.

(ii) it belongs to D1, as the vendor waiting for receipt of the balance purchase price upon completion of the SPA.

(iii) D2 was only a stakeholder.

(iv) under the law, as stakeholder, D2 holds fiduciary duty to D1, thus it has to act only on the instruction of D1 and no one else, including plaintiff.

(v) D2 is not in a position to part with the monies without instruction from D1 on the balance purchase price, as the monies are kept on trust for the benefit of D1.

(vi) D2 has to abide by the instruction given by D1, hence the letter to plaintiff dated 17 February 2012 followed on by a confirmation *vide* letter from D2 dated 21 February 2012.

(vii) likewise, D2 has to also abide by D1's instruction on 16 April 2012, countervailing his earlier instruction.

(viii) by issuing the confirmation letter, D2 has safeguarded and protected its rights *vis* D1 and had not assumed responsibility to the plaintiff for the loan repayment. It is therefore unreasonable for the plaintiff to have relied on it.

(ix) if D2 were to repay plaintiff pursuant to the instruction by D1 on 17 January 2012, it would have committed breach of trust *vis* its position as stakeholder, and exposing itself to a claim by D1, as it would be going against his express instruction to return the RM100,000 to him instead.

(x) it is not the duty of D2 to enquire further from the plaintiff, if it is true, as its nexus with plaintiff is only to convey and confirm the instruction given by D1.

(xi) in fact, it is for the plaintiff to take it up with D1 and not D2, for not to have received the repayment.

(xii) D2 is not privy to the loan transaction between plaintiff and D1, it need not go beyond its boundary to enquire further from the plaintiff. If it had done so, D2 would have stepped outside its normal role as elucidated in the case of *Al-Kandari*, followed in *Pushpaleela*. In that respect, D2's relationship *vis-à-vis* D1 and plaintiff ceases the moment the instruction by D1 on 17 January 2012 was conveyed to the plaintiff, later confirmed *vide* letter dated 21 February 2012.

(xiii) with the confirmation letter, D2 did not assume responsibility to ensure loan repayment by D1.

(xiv) by contending D2 had assumed responsibility when it issued the confirmation letter, is akin to stating, D2 has assumed role as guarantor for D1's loan repayment.

(xv) cessation of D2's responsibility came about as it had issued the confirmation letter to the plaintiff dated 21 February 2012, which is of equal force with the indemnity letter given by D1 to D2, after he had countervailed his earlier instruction on 17 January 2012, for the amount of RM100,000 to be returned to him instead.

(xvi) by only conveying the instruction of D1 to plaintiff on 17 January 2012 and confirming it *vide* letter dated 21 February 2012, would not be capable of exposing D2 to a claim founded on negligence, that it owes a duty of care to the plaintiff and it had allegedly breached it. This is because there is no legal advice rendered by D2 to plaintiff amounting to misrepresentation which the plaintiff had relied on. Plaintiff's reliance, as emphasised earlier, has to be on D1's promise to have the loan of RM100,000 repaid, once he received the balance purchase price due under a SPA from the purchaser who was represented by D2, as negotiated and agreed upon amongst them. It is unreasonable for the plaintiff to have relied on a representation made by D2, when it was merely communicating the instruction received from D1, with whom D2 had a legal relationship as a stakeholder. If D1 did not instruct D2 to do so, it would not have communicated to the plaintiff, likewise for the countervailing instruction.

(xvii) the plaintiff shall not be ignorant of the law, that as a stakeholder, D2 shall only act on the instruction of D1 as the vendor, and not any other party, including the plaintiff. Ignorance of the law is not an excuse.

Conclusion

[20] Applying the 'plainly wrong test', as propounded by the apex court in the case of *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estate Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1; [2020] 12 MLJ 67 on appellate intervention, the SCJ ought to have also considered public policy when determining the plaintiff's claim for negligence against D2. It was so held in the case of *Pushpaleela*. By deciding D2 ought to have released the RM100,000 to the plaintiff, the SCJ had failed to consider, if it had done so, thus refusing to abide by the instruction of D1, who is the vendor to the sale and purchase transaction, D2 would have breached its duty in law as a stakeholder. The SCJ had also erred in law when she did not consider the fact that D2 was at all material times legally bound to act on the instruction of D1 and that it is also wrong for the plaintiff to have regarded D2 as guarantor for the loan repayment. She ought to have also considered, that legally plaintiff ought to have pursued with D1 who had benefited from the loan but had refused repayment. To pursue a claim against D2, is like clutching at straws, as duty of care cannot be extended to D2 for the reasons

adumbrated above. In sum total, the SCJ had also erred in fact and law when she held without any basis that with issuance of the confirmation letter, D2 had created a duty of care to the plaintiff. Furthermore, there is no loss suffered by the plaintiff, as the plaintiff could still pursue against D1, against whom there is an enforceable JID.

[21] The plaintiff could not under the law, latch on to the misconception that since there is a conveyancing transaction involving D1 and D2, pursuant to which a letter of instruction and confirmation was issued to the plaintiff with regard to repayment of the loan amount of RM100,000 taken by D1, it would *per se* attribute liability on D2 to ensure repayment is made, as it had then assumed responsibility that D1 would make the repayment as agreed. The plaintiff has to be mindful that the case in its entirety is independent of the conveyancing transaction between D1 as one of the vendors and the purchasers of the property on another part. The repayment of the loan taken by D1 from the plaintiff is secondary and it came about resulting from the pre-negotiated agreement between plaintiff and D1, and later D1 instructing D2 to inform the plaintiff on the mode and manner of repayment of the loan. As the conveyancing transaction between D1 and D2 is distinct and independent from the pre-negotiated agreement on repayment of the loan between the plaintiff and D1, in law the plaintiff is not absolved from proving negligence *vis* assumption of responsibility on the part of D2 towards plaintiff, when the facts and circumstance of the case in its entirety shows that D2, as a firm of solicitors had at all material times acted professionally to the benefit of all parties, including the plaintiff. It had merely acted on the instruction of D1 to have the amount of RM100,000 released to D1 instead of the plaintiff, as instructed earlier. It is a fact that D2 did not assume responsibility towards the plaintiff, on the basis that in whatsoever circumstance and regardless of the instruction by D1, it would transmit the RM100,000 to the plaintiff. That is not the case, as D2 at all material times was subject to the instruction of D1. This is further fortified by the unequivocal qualification by D2 in both the letter of instruction and confirmation, that it was acting merely on the instruction of D1. Flowing from that, D2 finally remitted the RM100,000 to D1 on his instruction. By doing so, D2 has not acted negligently, but on the instruction of D1, for which it could not be faulted. Therefore, D2 at all material times had made it clear that the task it carried out is for and on behalf of D1, thus delimiting the scope of its task. The SCJ was obviously wrong when she attributed liability to D2 solely premised on the letter of instruction and confirmation it had issued to the plaintiff, without taking into consideration the stark fact that both the letters were issued on instruction by D1, and there was already a pre-negotiated agreement on repayment of the loan by D1 to the plaintiff. The common course of business as for D2 being a firm of solicitors, is to act on instruction and not independently on its own, and in this case on the specific instruction of D1, that the amount of RM100,000 is to be paid to him and not the plaintiff. On that score, plaintiff has been unsuccessful in

proving a case of negligence *vis* assumption of responsibility against D2 on a balance of probabilities. On the other hand, D2 has been successful in proving to the court that it was at all material times acting on the specific instruction of D1, which it was duty bound to follow as a stakeholder, thus not to have assumed any form of duty or responsibility to the plaintiff with regard to the repayment of the loan amount of RM100,000 due and owing from D1.

[22] Therefore, it is wrong for the plaintiff to have pursued a claim against D2 premised on the conveyance of instruction and confirmation on repayment of the loan from D1, which was done in good faith. Based on the facts and circumstance of the case, the plaintiff has sued D2 without a basis; as the material facts available do not in fact give rise to a cause of action in law against D2 for tort of negligence *vis* assumption of responsibility. The link between the plaintiff and D2, is tenuous for it to sue D2. Resulting from that, D2 ought to be compensated with a deserving amount of costs which in this court's view has to be punitive, when it is dragged to court, on the face of an overwhelming case against D1.

[23] In the upshot, the SCJ had arrived at findings that were plainly wrong. Considering the evidence available, in its totality, the plaintiff has been unsuccessful in establishing negligence on the part of D2 *vis* assumption of its responsibility. Taking cue from the decision of the apex court in the case of *Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal* [2018] 2 CLJ 641, and for the reasons alluded to above, the SCJ had decided to allow the plaintiff's claim, based on findings that could not reasonably be explained or justified and is one which no reasonable judge could have made. Flowing from that, appeal by D2 to this court is allowed with costs to be paid by plaintiff.

[24] On the issue of costs, counsel for D2/appellant had prayed for costs of RM20,000 whilst counsel for plaintiff/respondent prayed for costs of RM5,000. Costs allowed at the Sessions Court was RM10,000. It is iterated, in view of the nature of claim against D2, a firm of solicitors, this court views it seriously, as on the facts, D2 as a law firm of solicitors was acting professionally on the instruction of D1. Thus, it is unjustified for the plaintiff to have pursued a case of negligence against D2, willy-nilly. Flowing from that, costs of RM20,000 is ordered to be paid by plaintiff to D2, subject to payment of an allocator fee.